

NO. 08-2677

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

CAROL ANNE BOND,
Appellant

APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE
IN CRIMINAL NO. 07-00528 IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SUPPLEMENTAL BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF SUBJECT MATTER JURISDICTION

Because the defendant was charged in an indictment with violations of federal criminal law, the district court had subject matter jurisdiction over the case pursuant to 18 U.S.C. § 3231.

STATEMENT OF APPELLATE JURISDICTION

Based on the timely filing of a notice of appeal from the order of judgment in a criminal case against defendant Carol Bond, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether 18 U.S.C. § 229(a)(1), which makes it unlawful for any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon," constitutes a valid exercise of Congress's powers under Article I of the Constitution.

STATEMENT OF THE CASE

On September 5, 2007, a grand jury in the Eastern District of Pennsylvania returned an indictment charging the defendant, Carol Anne Bond, with two counts of acquiring, transferring, receiving, retaining, possessing, or using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1), and two counts of theft of mail matter, in violation of 18 U.S.C. § 1708. App. 6-10. Bond moved to dismiss the chemical weapon charges in the district court, claiming that the "charged statute does not represent a valid exercise of federal authority under the Commerce Clause, the Treaty Power, or other potential authority in the United States Constitution." App. 46. The district court denied her motion to dismiss, finding that Section 229(a)(1) was "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." App. 168. In considering Bond's motion, the district court asked "whether or not, the treaty by its objects, did not involve interstate and foreign commerce," App. 100, but in the end the court did not resolve the Commerce Clause issue given its conclusion that the statute was a valid exercise of

Congress's authority under the Necessary and Proper Clause to implement the Chemical Weapons Convention. See App. 168, 178.

Before trial, Bond pleaded guilty to all four counts of the indictment, reserving her right to appeal the denial of her motion to dismiss, among other issues. See App. 380. On June 3, 2008, the district court sentenced Bond to six years of imprisonment, to be followed by five years of supervised release, and the court ordered her to pay restitution and a \$2,000 fine. The sentence of six years' imprisonment fell within the advisory guideline range of 70-87 months' imprisonment calculated by the court. App. 367-74, 380-86.

On appeal, Bond renewed her argument that Congress lacked the constitutional authority to enact 18 U.S.C. § 229. Bond asserted that Congress could not rely on the Treaty Power to enact a statute without "another [independent] basis in the Constitution to do so." Def. Br. 17-19. In the absence of such authority, she argued, the chemical weapons statute encroached on the powers reserved to the states under the Tenth Amendment. Id. In response, the government defended the district court's

conclusion that Congress had the authority to enact the Chemical Weapons Statute under the Treaty Power and the Necessary and Proper Clause, arguing that the statute therefore did not violate the Tenth Amendment. See Gov't Br. 18, 27.

Following oral argument, this Court requested supplemental briefing on the question whether Bond had standing to assert that Section 229 encroached on state sovereignty in violation of the Tenth Amendment absent the involvement of a state or its instrumentalities. In response, the government acknowledged that it had not raised a standing objection but argued that, under Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939), Bond lacked standing to assert an infringement of state sovereignty under the Tenth Amendment. Following the supplemental briefing, this Court concluded that, under TVA, Bond "lack[ed] standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties." United States v. Bond, 581 F.3d 128, 137 (3d Cir. 2009). This Court affirmed Bond's conviction and sentence without reaching

the merits of her Tenth Amendment claim.¹

The Supreme Court granted certiorari to address the limited question "whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." Bond v. United States, 131 S. Ct. 2355, 2360 (2011). In the Supreme Court, the government changed its position on the standing question; the Acting Solicitor General filed a brief in support of Bond's argument that she possessed standing to challenge her chemical weapons convictions on the ground that 18 U.S.C. § 229 exceeded the scope of Congress's enumerated powers.² After briefing and oral argument by the parties, as well as by counsel appointed to defend this

¹ This Court did consider the merits of Bond's other arguments on appeal. The Court held that the chemical weapons statute was not vague or overbroad; that the district court properly denied Bond's motion to suppress evidence; and that the district court properly calculated Bond's Sentencing Guidelines range. Bond, 581 F.3d at 138-41. Those rulings were not the subject of Bond's petition to the Supreme Court, and therefore they remain intact.

² The government argued in the Supreme Court, however, that Bond did not have standing to claim that the statute interfered with a specific aspect of state sovereignty, either instead of or in addition to her enumerated powers claim. See U.S. Br. 43.

Court's decision, the Supreme Court reversed and remanded.
Id. at 2367.

The Supreme Court held that the right to assert federalism-based limitations on Congress's authority to legislate does not belong exclusively to the states. 131 S. Ct. at 2365. In an appropriate case, the Court found, an individual litigant may challenge a law on the ground that it contravenes principles of federalism, just as individuals may challenge actions that transgress separation-of-powers limitations. Id. There was, according to the Court, "no basis in precedent or principle to deny [Bond's] standing to raise her claims." Id. at 2367. The Court indicated that "[t]he ultimate issue of the statute's validity turns in part on whether the law can be deemed 'necessary and proper for carrying into Execution' the President's Article II, § 2 Treaty Power," but it "expresse[d] no view on the merits of that argument." Id.

STATEMENT OF FACTS

According to her guilty plea and the record at sentencing, Bond, who had a master's degree in microbiology, worked as a technical assistant at a chemical company, Rohm & Haas, in Spring House, Pennsylvania. App. 191, 197, 201. When Bond discovered that her close friend, Myrlinda Haynes, had become pregnant as the result of an affair with Bond's husband, Bond became so enraged that she promised to make Haynes' life "a living hell." App. 299. On more than two dozen occasions between November 2006 and May 2007, Bond used two highly toxic chemicals, 10-chlorophenoxarsine and potassium dichromate, to attack Haynes by leaving the chemicals on the door handles of Haynes' car, on the front doorknob of her house, and in her mailbox. App. 277-79; PSR ¶¶ 11, 18-20.

Haynes suffered from these attacks as many as three or four times a week. App. 281. Haynes, a single mother, routinely found it necessary to carry her toddler out to the car using one hand, so that she could use the other hand to check for and to remove the chemicals that were repeatedly pasted into her front and rear door handles. App. 280-83. On one occasion, when Haynes forgot to clean her doorknob,

she sustained a chemical burn on her thumb. App. 286. Haynes notified local police, who provided an ineffectual response. App. 284-85.³ After finding chemicals in her mailbox, Haynes notified postal officials, who brought in federal Postal Inspectors to conduct an investigation. Through video surveillance, they observed and identified Bond as the person leaving chemicals on Haynes' property. App. 286-87; PSR ¶¶ 12, 13.

The two chemicals that Bond used to attack Haynes were inherently dangerous. 10-chlorophenoxarsine, a white chemical, irritates the skin and eyes and, if swallowed, the throat and gastrointestinal tract. App. 237-38. Either upon single or multiple exposures, it can damage the body's internal organs, such as the kidney and liver. Id. With multiple exposures it causes red blood cells to break apart and damages the brain. Id. One-half of a teaspoon of 10-chlorophenoxarsine would be lethal to an adult, while much

³ During the course of the attacks, Haynes repeatedly called her local police. App. 279. On one occasion, the police checked the white powder to determine whether someone had been leaving cocaine on Haynes' car. App. 279-80. On another occasion, when Haynes brought to the police station a sample of the chemical that had been left on her door, the police sent it to a lab for analysis. App. 280. Otherwise, throughout the course of these attacks, the local police simply advised Haynes to have her car cleaned. App. 284-85.

less than one-quarter of a teaspoon would be lethal to a child. App. 239, 244. A toxic dose of this chemical would be just a few crystals of the substance. App. 245-46. Even a single deposit of 10-chlorophenoxarsine that Bond left on Haynes' car exceeded the toxic dose for either children or adults. App. 248-49.

Potassium dichromate, a red chemical, is a corrosive material that will destroy tissue upon contact. App. 249. Potassium dichromate may also cause ulceration and perforation of the nasal septum as well as pulmonary sensitization or allergic asthma, while higher exposures may cause pulmonary edema. PSR ¶ 19. If potassium dichromate is ingested, it may cause severe burns of the mouth, throat, and stomach, leading to death. Id. Any skin contact may cause redness, pain, and severe burns, and if exposed to broken skin, it may cause ulcers (chrome sores) and absorption, which may cause systemic poisoning, affecting kidney and liver functions. Id. Potassium dichromate is lethal in even smaller doses than 10-chlorophenoxarsine. Less than one-quarter of a teaspoon would be lethal to an adult, while just a few crystals would be lethal to a child. App. 252-53. A toxic dose of potassium dichromate for a

child would be a single small crystal. App. 255. Once again, the amount of this chemical that Bond left for the victim on even a single occasion was "many, many times" the amount required for toxic or potentially lethal doses. App. 254-56.

Both of the chemicals used by Bond possessed the unusual property of being highly dangerous when contacted by the skin. Thus, 10-chlorophenoxarsine carries a dermal LD50 rating. App. 240-41. This means that a given dose of that chemical was lethal to 50% of the animal test subjects whose skin was exposed to it under controlled conditions. App. 240-43. Ninety percent of chemicals do not have a dermal LD50 rating because, in most cases, the skin acts as a highly effective barrier to absorption. App. 237, 241-42. Potassium dichromate is even more dangerous as a weapon. Not only does it carry a dermal LD50 rating, but its dermal LD50 is actually lower than its oral LD50. App. 251. This means that potassium dichromate is more dangerous when touched than when ingested. Id. Only about one percent of chemicals carry a lower dermal LD50 rating than their oral LD50 rating. App. 251-52.

During the period of Bond's employment, Rohm & Haas

maintained an inventory of about 20,000 chemicals. App.

193. Of these, the vast majority, in excess of 95 percent, were maintained under ordinary inventory controls. App.

195-97. As a person performing scientific work, Bond had access to these chemicals. App. 195-96, 214-15. She also had access to Rohm & Haas' inventory control systems and to the material safety data sheets that described the effects and dangers of these chemicals. App. 196, 199. Bond

admitted after her arrest that she took chemicals from Rohm & Haas during her employment. App. 145-46. While Bond had

access to both 10-chlorophenoxarsine and potassium

dichromate at Rohm & Haas, Bond produced documentation at

sentencing establishing that she had purchased a quantity of

potassium dichromate over the Internet. See App. 360-62.

STATEMENT OF RELATED CASES

Other than the district court and Supreme Court proceedings discussed in the Statement of the Case above, the government is not aware of any related case or proceeding that is completed, pending, or about to be presented before this Court or any other court or agency, state or federal.

SUMMARY OF ARGUMENT

The district court properly refused to dismiss the chemical weapons counts of the indictment. The Chemical Weapons Statute, 18 U.S.C. § 229 et seq., is independently supported both by the Commerce Clause and by the Treaty Power, when combined with the Necessary and Proper Clause.

First, Congress's determination to bar the possession and use of chemical weapons was a rational exercise of its comprehensive power to regulate interstate and foreign commerce. Congress acted to enforce its obligations under the Chemical Weapons Convention, which expressly determined that a complete and effective prohibition on the production and use of chemical weapons is a necessary step to assure free trade in chemicals and international cooperation and exchange of scientific and technical information in the field of chemical activities.

The Chemical Weapons Statute, including 18 U.S.C. § 229(a)(1), is therefore directly analogous to the Controlled Substances Act upheld in Gonzales v. Raich, 545 U.S. 1 (2005), on the grounds that the eradication of the market in certain controlled substances is part and parcel of Congress's broad power to regulate interstate commerce in

controlled substances generally. Likewise, with regard to the Chemical Weapons Statute, Congress permissibly determined that a ban on the use of chemicals as weapons was necessary to the broader regulation of commerce in chemicals generally.

Second, and independently, because the statute under which Bond was convicted was enacted pursuant to a valid international treaty, it is supported by the Treaty Power and the Necessary and Proper Clause. The Treaty Power plainly authorized the President, with the advice and consent of the Senate, to enter an international compact regarding the regulation of chemical weapons, a matter of national and foreign policy of the first order. For more than a century, the United States has been a party to similar multilateral agreements designed to outlaw the production, use, and stockpiling of weapons capable of inflicting disproportionate or unnecessary suffering during peace or war.

The Chemical Weapons Convention, in turn, required the United States to adopt penal legislation barring the possession or use of chemical weapons. Congress was permitted to enact such legislation as necessary and proper

to fulfillment of the Treaty Power. Missouri v. Holland,
252 U.S. 416, 435 (1920). Accordingly, the Chemical Weapons
Statute does not violate the Tenth Amendment by infringing
on the states' reserved powers.

ARGUMENT

THE DISTRICT COURT PROPERLY REFUSED TO DISMISS THE CHEMICAL WEAPONS COUNTS OF THE INDICTMENT.

Standard of Review

This Court exercises plenary review of the constitutionality of a statute, though it "must respect Congress's ample discretion to determine the appropriate exercise of its Commerce Clause authority." United States v. Rodia, 194 F.3d 465, 469 (3d Cir. 1999). Acts of Congress are presumed to be constitutional, e.g., Munn v. Illinois, 94 U.S. 113, 123 (1877), and will be invalidated only upon a plain showing that Congress has exceeded its constitutional bounds, United States v. Five Gambling Devices, 346 U.S. 441, 449 (1953); United States v. Whited, 311 F.3d 259, 266 (3d Cir. 2002). "That presumption is 'not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is within their delegated power'" Id., quoting Five Gambling Devices, 346 U.S. at 449. "Accordingly, '[a]lthough the judicial branch is the final arbiter of the constitutionality of a statute,' we review Congress's determination that it was within its

constitutional authority with 'substantial deference.' "

Whited, 311 F.3d at 266-67, quoting United States v. Gregg, 226 F.3d 253, 261 (3d Cir. 2000).

Discussion

The issue in this remand proceeding is whether the district court erred in denying defendant/appellant Carol Bond's motion to dismiss the two counts of the indictment that charged her with violating the Chemical Weapons Statute, 18 U.S.C. § 229 et seq. In particular, Bond maintains that the statute violates the Tenth Amendment inasmuch as, according to Bond, it is unsupported by any power granted to the federal government by the Constitution. Because, however, the statute under which Bond's challenged convictions were obtained is independently supported by the Commerce Clause and by the Treaty Power, in combination with the Necessary and Proper clause, Bond's Tenth Amendment challenge fails on its merits, and the district court's decision should be affirmed.

A. Congress Had Authority Under the Commerce Clause and the Necessary and Proper Clause to Enact the Chemical Weapons Statute.

Congress has broad power under the Commerce Clause

to regulate interstate and foreign commerce in chemicals, including toxic chemicals that may be misused for criminal purposes to harm others. The text and history of the Chemical Weapons Convention make clear that promoting commerce and trade in chemicals was a significant objective of the Convention. Indeed, the Convention's text makes this goal explicit by providing that a "complete and effective prohibition" on the production and use of chemical weapons is a "necessary step" to promote "free trade in chemicals" and "international cooperation and exchange of scientific and technical information in the field of chemical activities."⁴ The Chemical Weapons Statute, including 18 U.S.C. § 229(a)(1), is therefore directly analogous to the Controlled Substances Act upheld in Gonzales v. Raich, 545 U.S. 1 (2005), on the grounds that the eradication of the illicit market in certain controlled substances is part and parcel of Congress's broad power to regulate interstate commerce in controlled substances generally. Indeed, the Court in Raich listed the Biological Weapons Statute, the Nuclear Materials Statute, and the Plastic Explosives

⁴ See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("Chemical Weapons Convention"), Jan. 13, 1993, S. Treaty Doc. No. 103-21, 32 I.L.M. 800.

Statute as examples of Congress using its Commerce Clause power in a rational way to regulate commerce by broadly prohibiting the production, possession, or use of certain products by individuals. 545 U.S. at 26 & n.36. Congress likewise had ample power under the Commerce Clause to enact 18 U.S.C. § 229(a)(1) as a means to regulate interstate and foreign commerce in certain toxic chemicals.⁵

1. Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States," U.S. Const. art. I, § 8, cl. 3, and possesses corresponding authority under the Necessary and Proper Clause, *id.* art. I, § 8, cl. 18, to pass legislation that constitutes a reasonable means to effectuate the regulation of foreign and interstate commerce. Where a legislative enactment implicates foreign commerce, Congress's power is at least coextensive with its authority to regulate commerce among the states. See United States v. Clark, 435 F.3d 1100, 1111 (9th Cir. 2006), citing Louis Henkin, Foreign Affairs and

⁵ In earlier briefing before this Court, the government relied only on the Treaty Power to support the constitutionality of the statute, consistent with the district court's determination. However, an argument based on the Commerce Clause has not been waived, for the reasons set forth at the conclusion of this section. See infra at pp. 36-39.

the Constitution 70 n.9 (1972) ("[i]t is generally accepted . . . that the power of Congress is the same as regards both" foreign and interstate commerce).⁶

In determining whether a federal statute may be sustained as a proper exercise of Congress's power to regulate interstate and foreign commerce, courts apply a "rational basis" standard that reflects broad deference to legislative judgments regarding whether the activity at issue substantially affects interstate or foreign commerce and whether the regulation of the activity is reasonably necessary to achieve Congress's purposes. See, e.g., Raich, 545 U.S. at 22; United States v. Lopez, 514 U.S. 549, 557

⁶ In United States v. Pendleton, -- F.3d --, 2011 WL 3907120 (3d Cir. Sept. 7, 2011), the Court declined to resolve whether the power to regulate foreign commerce is in fact broader than congressional authority with regard to interstate commerce. The Court held that, absent contrary guidance from the Supreme Court, it would assume that the power to regulate foreign commerce extends only to subjects which fall within one of the three recognized categories in which Congress is authorized to regulate interstate commerce: (1) the use of the channels of such commerce; (2) the instrumentalities of such commerce, or persons or things in such commerce; and (3) activities that substantially affect such commerce. Id. at *5-*6, citing United States v. Lopez, 514 U.S. 549, 558-59 (1995). The full extent of Congress's power to regulate foreign commerce need not be decided here because, as further explained below, regulating the use and possession of chemical weapons by individuals such as Bond plainly falls within the third category identified in Pendleton.

(1995); see also United States v. Comstock, 130 S. Ct. 1949, 1956 (2010) ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."). Thus, "[a] court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects . . . commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." Hodel v. Indiana, 452 U.S. 314, 323-24 (1981); see, e.g., Jinks v. Richland County, 538 U.S. 456, 461-65 (2003); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819).

Moreover, "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate

interstate commerce." United States v. Darby, 312 U.S. 100, 118 (1941). See, e.g., United States v. Morrison, 529 U.S. 598, 609 (2000) ("Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, . . . i.e., those activities that substantially affect interstate commerce"), quoting Lopez, 514 U.S. at 558-59; Wickard v. Filburn, 317 U.S. 111, 124 (1942); see also NLRB v. Jones & Lauthlin Steel Corp., 301 U.S. 1, 36-37 (1937) ("[T]he power to regulate commerce is the power to enact all appropriate legislation for its protection and advancement.") (internal quotation marks omitted). In addition, "where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence." Lopez, 514 U.S. at 558, quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968) (emphasis omitted); see, e.g., Wickard, 317 U.S. at 127-29.⁷

⁷ This authority to regulate local activities which substantially affect interstate or foreign commerce is the third category of permissible regulation recognized in Lopez. It is addressed at length in the recent decision in United States v. Walker, -- F.3d --, 2011 WL 4035767, at *12-*14 (3d Cir. Sept. 13, 2011), which explains the considerable authority of Congress to regulate local economic activities which may in the aggregate substantially

2. When Congress enacted the Chemical Weapons Statute, it was fulfilling its obligation as a party to the Chemical Weapons Convention to enact municipal legislation implementing certain provisions of that international treaty. Both the preamble and substantive provisions of the Convention make clear that, in addition to eliminating the use of chemical weapons as a mode of warfare, another significant objective of the signatories was to "promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities . . . in order to enhance the economic and technological development of all States Parties." Chemical Weapons Convention, pmbl. ¶ 9 (emphasis added). The Preamble further explains that attainment of the Convention's objectives -- including the enhancement of trade and technological development -- requires "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons" as a "necessary step" in the achievement of those objectives. Id. ¶ 10.

affect interstate commerce. Walker upheld a prosecution under the Hobbs Act for robbery of a neophyte drug dealer who sold cocaine he obtained for \$60.

Article XI of the Convention, entitled "Economic and Technological Development," addresses the promotion of free trade and the development of chemicals. It provides that "[t]he provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of the States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention." Chemical Weapons Convention art. XI. To that end, the Article requires the signatories to "[n]ot maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." Id. (emphasis added).

When the President submitted the Convention to the

Senate for its advice and consent to ratification, the State Department's article-by-article analysis of the Convention explained that Article XI "represents one of the most difficult compromises reached in the Convention. This Article balances the desire to encourage free trade in chemicals, equipment and technology with the desire to prevent the proliferation of chemical weapons."⁸ The Senate Report recommending that the Senate give its advice and consent to ratification of the Convention confirmed that "Art. XI seeks to balance free trade in legitimate chemicals with preventing the proliferation of chemical weapons" and found that the Convention "should not be implemented in a manner that hampers the economic and technological development of States Parties or international cooperation in chemical activities for purposes not prohibited under the Convention." S. Exec. Rep. No. 104-33, at 5 (1996).

Thus, the Chemical Weapons Convention sought, on the one hand, to promote free trade and the exchange of

⁸ State Department article-by article analysis accompanying Message from the President of the United States Transmitting The Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and On their Destruction, Opened for Signature and Signed by the United States at Paris on January 13, 1993, S. Treaty Doc. No. 103-21, at 72 (1993).

technology in chemicals, and, on the other, to prohibit the proliferation, manufacture, and use of chemical weapons -- which the signatories perceived as an impediment to the free trade objective. Article VII, Section 1(a) of the Convention achieves that balance by imposing on the signatories an obligation (1) to "[p]rohibit natural and legal persons anywhere on its territory . . . from undertaking any activity prohibited to a State Party," and (2) to prohibit "in any place under its control any activity prohibited to a State Party under [the] Convention," including "enacting penal legislation with respect to such activity." Chemical Weapons Convention art. VII, ¶ 1(a)-(b) .

In fulfilling that obligation by enacting the Chemical Weapons Convention Implementation Act, which includes 18 U.S.C. § 229(a)(1),⁹ Congress was advancing the Convention's broad objective of fostering international trade in chemicals by proscribing conduct by individuals that would, in the aggregate, substantially inhibit legitimate foreign and interstate commerce in certain

⁹ See Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, Title II, § 201(a), Oct. 21, 1998, 112 Stat. 2681-866.

chemicals. Given this background, it is clear that the criminalization of the activity prohibited by Section 229 bears a "rational" relationship to the regulation of foreign and interstate commerce in chemicals. See Lopez, 515 U.S. at 557. As the Convention's preamble suggests, the signatories must be confident that the substances in which the chemical industry trades will not be misused as weapons, and also that shared information concerning the use and production of chemicals will not be exploited by those bent upon harming others. Absent such assurances, individual governments may be more likely to impose uncoordinated national restrictions that chill research and development and reduce overall trade in chemicals. See, e.g., Executive Order 12938, sec. 3(b) (providing that potential export prohibitions in goods, technology, or services related to chemical weapons not apply when the export is to a country that has entered into a bilateral or multilateral arrangement with the United States for control of such weapons).

This case aptly illustrates the need to prohibit the personal possession and use of chemical weapons as necessary and proper to the promotion of free trade. By

Bond's own admission, she was able to acquire potassium dichromate through the Internet. App. 360-62. While that chemical has many legitimate uses, it is also highly toxic, even in small doses. See App. 252-55. In the absence of comprehensive criminal legislation prohibiting the use of that substance as a weapon, its ready accessibility for legitimate purposes could be curtailed, as governments might well take action unilaterally to restrict exports out of concern that the chemical would be misused, and manufacturers could be forced to adopt more elaborate and expensive controls on its production and sale. This, in turn, would both cause tangible economic loss to those engaged in the stream of commerce and, more importantly, deprive those with a legitimate need for the substance of its benefits. Particularly given the reciprocal commitments struck with other nations in the Convention, Congress plainly had a rational basis to conclude that such losses would affect interstate and international commerce and that a ban on using or possessing such substances as weapons was a necessary and proper means of both eradicating the trafficking of chemicals for use as weapons and promoting legitimate commerce in such substances.

3. The Supreme Court's decision in Gonzales v. Raich, 545 U.S. 1 (2005), strongly supports the conclusion that the Chemical Weapons Convention Implementation Act, like the Controlled Substances Act, the Biological Weapons Statute, the Nuclear Materials Statute, and the Plastic Explosives Statute, is a valid exercise of Congress's power to regulate interstate and foreign commerce. In Raich, the respondents maintained that the Controlled Substances Act ("CSA"), which prohibited in-state cultivation and use of marijuana for medical purposes, was beyond the power vested in Congress by the Commerce Clause. Id. at 5. The Supreme Court rejected the argument. The Court explained that "the activities regulated by the CSA are quintessentially economic," as the statute is one "that regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." Id. at 25-26. The Court found that Congress was entitled to regulate "purely intrastate activity that is not itself 'commercial,' . . . if it concludes that failure to

regulate that class of activity would undercut the regulation of the interstate market in that commodity." Id. at 18. Although acknowledging that the Raich respondents' own conduct was "intrastate," "noncommercial," and "different . . . from drug trafficking,"⁹ the Supreme Court held that these facts did not require an exemption from "the larger regulatory scheme." Id. at 26-27. Specifically, the Court had "no difficulty" in concluding that Congress "had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." Id. at 22.

To illustrate the premise that Congress can regulate the intrastate manufacture of a product as a rational means of regulating interstate commerce in that product, the Raich Court cited several specific examples of appropriate statutory commercial regulations, including the Biological Weapons Statute, 18 U.S.C. § 175(a); the Nuclear Materials Statute, 18 U.S.C. § 831; and the Plastic Explosive Statute, 18 U.S.C. § 842(n). See Raich, 545 U.S. at 26 n.36. Each of these statutes outlaws the possession, acquisition, and disposition of a dangerous agent at any

place in the United States. In the case of the Biological Weapons Statute, the relevant language is virtually identical to that of the Chemical Weapons Statute. Compare 18 U.S.C. § 175(a) ("Whoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent") with 18 U.S.C. § 229(a) ("it shall be unlawful for any person knowingly . . . to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon"). By identifying these three statutes as examples of appropriate economic regulation of the marketplace under the Commerce Clause, the Supreme Court left no doubt that the Chemical Weapons Statute falls well within Congress's broad power to regulate foreign and interstate commerce.

Moreover, the Chemical Weapons Statute, like the Controlled Substances Act and the other statutes referred to in Raich, is "quintessentially economic" as it regulates "the production, distribution, and consumption of commodities." Raich, 545 U.S. at 25. The Chemical Weapons Statute defines "chemical weapons" to include all chemicals that, through their chemical action, "can cause death,

temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. § 229F(8)(A). Using this definition, the statute prohibits all non-exempt persons from acquiring, producing, possessing, transferring, or using "chemical weapons." 18 U.S.C. § 229(a). Thus, like the Controlled Substances Act upheld in Raich, the Chemical Weapons Statute presents a comprehensive system of regulation -- designed both to undermine the illegal market associated with certain commodities and, consequently, to stabilize the legal market associated with those commodities -- that is rationally related to the promotion of interstate and foreign commerce in chemicals.¹⁰

The covered chemicals capable of causing "death, temporary incapacitation or permanent harm to humans or animals," 18 U.S.C. § 229F(8)(A), are all commodities in interstate or foreign commerce. Indeed, Bond herself acknowledged that she acquired one of the chemicals through the Internet. Thus, as in Raich, Congress was "well within its authority" under the Commerce Clause and the Necessary

¹⁰ Raich approved of a statutory scheme in which Congress sought to eradicate the interstate market for marijuana entirely. See Raich, 545 U.S. at 19 n.29. In contrast, under the Chemical Weapons Statute, Congress sought to promote trade in chemicals by ensuring that they would not be misused as weapons.

and Proper Clause "when it enacted comprehensive legislation to regulate the interstate market" in these fungible commodities. 545 U.S. at 22. In Raich, the Supreme Court recognized that Congress has authority to regulate local activity that, in the aggregate, it rationally finds has a substantial effect on interstate and foreign commerce, and this authority allowed Congress to bar purely intrastate cultivation of controlled substances even for medicinal purposes. Similarly, that authority to regulate all activity that, in the aggregate, has a substantial effect on an interstate or foreign market allows Congress to prohibit all possession of chemical weapons for prohibited purposes, consistent with the terms and purposes of the Chemical Weapons Convention. Bond's constitutional challenge to Section 229 as beyond Congress's enumerated powers, and therefore in violation of the Tenth Amendment, should therefore be rejected.

4. While the government, in its initial defense of the district court's decision on appeal, only based its argument on Congress's authority under the Necessary and Proper Clause to enact legislation reasonably related to the exercise of the Treaty Power, it is incumbent on this Court

to consider any basis for affirming the validity of the statute. This Court operates under an "obligation to afford congressional enactments the benefit of all reasonable arguments in favor of constitutionality." United States v. Engler, 806 F.2d 425, 433 (3d Cir. 1986). This is so even when the government disclaims a potential basis to uphold a statute. Id. (rejecting government concession that a felony statute was unconstitutional in the absence of a scienter requirement). Moreover, "[a] statute is presumed constitutional . . . and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" Heller v. Doe, 509 U.S. 312, 320 (1993), quoting Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973). This obligation to consider any potential basis for upholding the constitutionality of a statute is consistent, in this case, with the more general rule that a "prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." Dandridge v. Williams, 397 U.S. 471, 475 n.6 (1970); see, e.g., In re Teleglobe Comm'ns Corp., 493 F.3d 345, 385 (3d Cir. 2007)

("[i]t is firmly established that [the Court] may affirm on any ground supported by the record," even if the appellee has not raised it; thus, the general rule that failure to present an issue in the opening brief on appeal constitutes a waiver applies only to an appellant, not the appellee).

Nor is this Court bound by congressional statements regarding the constitutional basis for the legislation Congress enacts. "The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948). Even when the preamble of a statute sets out the constitutional authority upon which Congress relies in enacting the legislation, "[the courts] may look beyond the expressed constitutional basis" in determining its validity as an exercise of Congress's legislative powers. Wheeling & Lake Erie Ry. v. Public Util. Comm'n, 141 F.3d 88, 92 (3d Cir. 1988). Even if 18 U.S.C. § 229(a)(1) had not been enacted as part of an implementing statute for a treaty that had as one of its core objectives the promotion of international trade in chemicals, it would still be clear from the terms of the statute itself and the relevant case law that Congress had

ample authority to enact it under the Commerce Clause and the Necessary and Proper Clause. Given that this result is so clear, this Court can and should uphold the constitutionality of 18 U.S.C. § 229(a)(1) as a valid exercise of Congress's power to regulate foreign and interstate commerce, and therefore it need not reach the Treaty Power question that Bond has pursued.

B. Congress Also Had Authority To Enact the Chemical Weapons Statute as Necessary and Proper To Implementation of the Chemical Weapons Convention.

To the extent the Court finds it appropriate to reach the issue, the district court was correct in dismissing Bond's constitutional challenge to 18 U.S.C. § 229(a)(1) on the basis that the legislation was a valid exercise of Congress's authority to implement treaties under the Necessary and Proper Clause.

1. The Constitution empowers the President, "by and with the Advice and Consent of the Senate, to make Treaties" U.S. Const. art. II, § 2. That power "is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other

nations." Asakura v. City of Seattle, 265 U.S. 332, 341 (1924), quoting Geofroy v. Riggs, 133 U.S. 258, 267 (1890); see also Geofroy, 133 U.S. at 267 ("it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country"). Indeed, "States may enter into an agreement on any matter of concern to them, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on any subject suggested by its national interests in relations with other nations." United States v. Lue, 134 F.3d 79, 83 (2d Cir. 1998) (citation omitted) (finding that the International Convention Against the Taking of Hostages ("Hostage Taking Convention"), T.I.A.S. No. 11,081 (Dec. 17, 1979), was well within the scope of the treaty-making power); Restatement (Third) of For. Rel., sec. 302, cmt. c.

The Chemical Weapons Convention falls well within that authority. Foreclosing "for the sake of all mankind" the "possibility of the use of chemical weapons" and promoting international cooperation in the field of chemical activities are objectives for which international action is obviously appropriate. Chemical Weapons Convention, pmb1.

6, 9. Further, proliferation concerns are certainly "a matter of grave concern to the international community." Lue, 184 F.3d at 83. In short, the threat that chemical weapons present to the safety and other interests of American citizens presents a foreign policy matter expressly assigned by the Constitution to the Executive under its treaty-making power.

For more than a century, the United States has been a party to similar multilateral agreements designed to outlaw the production, use, and stockpiling of weapons capable of inflicting disproportionate or unnecessary suffering during peace or war. For example, the United States is a party to the 1907 Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277. Article 23(e) of the Annex to that Convention prohibits the "employ[ment] [of] arms, projectiles, or material calculated to cause unnecessary suffering." The United States is likewise a party to the 1925 Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, as well as the 1972 Convention on the Prohibition of the Development, Production and

Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction ("Biological Weapons Convention"), Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 802. More recently, the United States became a party to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices ("Mines Protocol"), May 3, 1996, 2048 U.N.T.S. 93. This long line of international agreements prohibiting or regulating the use of weapons makes abundantly clear that a treaty restricting chemical weapons is a "proper subject[] of negotiation between our government and other nations." Asakura, 265 U.S. at 341.

As a party to the Chemical Weapons Convention, the United States undertook specific obligations in support of the Convention's broad objective "to exclude completely the possibility of the use of chemical weapons, through the implementation of [its] provisions." Chemical Weapons Convention, pmbl. ¶ 6. Achieving that goal requires preventing both states and non-state actors from developing, producing, and using chemical weapons, as the Convention makes clear. In addition to the prohibitions on state action found in Article I, Section 1 of the Convention,¹¹

¹¹ Article I, Section 1 of the Convention requires that "[e]ach State Party to this Convention undertake[] never

Article VII, Section 1 of the Convention requires that

[e]ach State Party shall . . . adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction . . . from undertaking any activity prohibited to a State Party under this Convention including enacting penal legislation with respect to such activity;

(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

Thus, the signatories viewed prohibiting both natural and legal persons from undertaking activities prohibited to a State Party as a "necessary measure" to implement their obligations under the Convention. Chemical Weapons Convention, art. VII.

These types of provisions are also common in international agreements that seek to limit or eradicate the use of certain types of weapons, and fall squarely within

under any circumstances: (a) [t]o develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; [or] (b) [t]o use chemical weapons."

the Treaty Power. See, e.g., Biological Weapons Convention, art. IV (requiring each signatory to "take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and other means of delivery specified [in the Convention] within the territory of such State, under its jurisdiction or under its control anywhere"); Mines Protocol, art. 14 (requiring each signatory to "take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control").

2. To fulfill its obligations under the Chemical Weapons Convention, the United States Congress enacted implementing legislation -- including 18 U.S.C. § 229(a)(1) -- that closely tracks the requirements of Article VII of the Convention. See Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-2856. Congress had full authority under the Necessary and Proper Clause to do so. As the Supreme Court explained in Missouri v. Holland, 252 U.S. 416 (1920), "[i]f the treaty is valid there can be no dispute about the validity

of the [implementing] statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." Id. at 432; accord United States v. Belfast, 611 F.3d 783, 805-06 (11th Cir. 2010) (holding, on the basis of Holland, that the Torture Act, 18 U.S.C. §§ 2340-2340A, constituted a "necessary and proper" implementation of the U.N. Convention Against Torture), cert. denied, 131 S. Ct. 1511 (2011); Lue, 134 F.3d at 82-84 (relying on Holland to sustain the Hostage Taking Act, 18 U.S.C. § 1203, as "necessary and proper" to implement the Hostage Taking Convention). See also Neely v. Henkel, 180 U.S. 109, 121 (1901) (the Necessary and Proper Clause "includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power").¹²

¹² Of course, in enacting legislation to implement a treaty, Congress cannot do so in a manner that contravenes an express prohibition in the Constitution. For example, in Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion), the plurality concluded that, although Congress could enact domestic legislation to give effect to the Status of Forces Agreement with Japan, it could not do so in a manner that deprived United States citizens of the right to an indictment and trial by jury. The plurality explicitly distinguished Holland as a case involving the Tenth Amendment and a treaty that was "not inconsistent with any specific provision of the Constitution." Id. at 18. The

Moreover, as the court explained in Belfast, in determining whether the Necessary and Proper Clause grants Congress authority to enact legislation implementing a treaty, the word "necessary" does not mean "absolutely necessary." 611 F.3d at 804, quoting Comstock, 130 S. Ct. at 1956. All that is required is that the implementing legislation bear a rational relationship to the treaty.¹³ See also Lue, 134 F.3d at 84 ("[T]he 'plainly adapted' standard requires that the effectuating legislation bear a rational relationship to a permissible constitutional end."). No court has ever suggested otherwise.

The Chemical Weapons Statute clearly satisfies this standard. As the court observed in Lue, an act of Congress "plainly bears a rational relationship to [a] Convention[] [where] it tracks the language of the Convention in all material respects." 134 F.3d at 84. As the district court noted in this case, see App. 168, the provisions of the plurality found that, when it comes to making valid treaties, "the Tenth Amendment is no barrier." Id. In this case, Bond raises no claim that the prohibition on chemical weapons infringes an express constitutional right.

¹³ At the same time, the Belfast Court correctly observed that "Congressional power to pass those laws that are necessary and proper to effectuate the enumerated powers of the Constitution is nowhere broader and more important than in the realm of foreign relations." Belfast, 611 F.3d at 805.

Chemical Weapons Statute virtually mirror the provisions of the Chemical Weapons Convention that the statute implements. Thus, 18 U.S.C. § 229(a)(1), which makes it unlawful for any person "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon," adopts almost verbatim the prohibitions contained in Articles I and VII of the Convention. Likewise, the definitions of "chemical weapon" and "toxic chemical" contained in the Chemical Weapons Statute are virtually identical to the definitions of those terms in the Convention. Compare Chemical Weapons Convention, art. II, §§ 1, 2 with 18 U.S.C. § 229F. Accordingly, the Chemical Weapons Statute plainly bears a "rational relationship" to the Convention it was enacted to implement.

3. In prior proceedings in this case, Bond did not dispute that the Chemical Weapons Statute constituted a proper implementation of the Convention; nor did she deny that her conduct fell squarely within the scope of 18 U.S.C. § 229(a)(1). Bond has instead argued that Section 229 "violates 'the unique system of federalism' protected by the Tenth Amendment" because it "'brings citizens into the

federal criminal area for conduct not properly the subject of federal prosecutors' " and because it "'significantly restrike[s] the delicate balance between the federal and state governments.'" United States v. Bond, 581 F.3d 128, 134 (3d Cir. 2009) (quoting Bond's argument in prior proceedings before this Court).¹⁴ As the government explains above, Congress had full authority to enact 18 U.S.C. § 229(a)(1) under the Commerce Clause to promote foreign and interstate trade in chemicals. But even on its own terms, and setting the Commerce Clause to the side, Bond's Tenth Amendment argument was squarely rejected in Holland and has not been adopted by the other courts that have addressed it.

In Holland, the Supreme Court addressed the constitutionality of the Migratory Bird Treaty Act (the "Bird Act"). The Bird Act implemented a treaty between the United States and Great Britain, which regulated the hunting of migratory waterfowl. The Bird Act prohibited the killing, capturing, or selling of any of the migratory birds falling within the scope of the treaty, except as permitted by regulation. Observing that two earlier acts of Congress

¹⁴ The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

regulating such activities had been struck down on Tenth Amendment grounds as encroachments upon the prerogatives of the states, the State of Missouri argued that the Bird Act was similarly invalid. 252 U.S. at 430-31. The Court squarely rejected Missouri's challenge on Tenth Amendment grounds, reasoning that "[t]o answer [whether the treaty and statute are void as an interference with the rights reserved to the states,] it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States . . . are declared the supreme law of the land." Id. at 432. The Court thus declined to conclude that the Bird Act "is forbidden by some invisible radiation from the general terms of the Tenth Amendment." Id. at 434.

Distinguishing the Bird Act from the earlier legislation that had been found to violate the Tenth Amendment, the Court explained that Article I invests Congress with independent authority to enact legislation necessary and proper to give effect to the express powers of the federal government, including the Executive's treaty-

making power under Article II. The Court found that "[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could" Holland, 252 U.S. at 433. See United States v. Lara, 541 U.S. 193, 201 (2004) (observing that the Executive's Treaty Power does not literally authorize Congress to legislate, but that treaties made pursuant to that power can enable Congress to address matters not otherwise authorized); Reid v. Covert, 354 U.S. at 18 (citing Holland and observing that "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier").

The courts of appeals have understood Holland to mean precisely what it says. In Lue, 134 F.3d at 80-81, the Second Circuit rejected a challenge to the Hostage Taking Act, 18 U.S.C. § 1203, nearly identical to the argument raised by Bond in this case, i.e., that, even if necessary and proper to the implementation of the Hostage Taking Convention, the statute impermissibly violated "the principles of federalism embodied in the Tenth Amendment" by

invading the authority of the states to prosecute "[d]omestic, non-political abductions." Id. at 84. The Lue court held that "the treaty power is not subject to meaningful limitation under the terms of the Tenth Amendment." Id. at 85. "Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material." Id. at 84-85, quoting Louis Henkin, Foreign Affairs and the United States Constitution 191 (2d ed. 1996).

Bond's argument was again rejected in United States v. Ferreira, 275 F.3d 1020, 1027 (11th Cir. 2001). In that case, a defendant also challenged the Hostage Taking Act as beyond Congress's "constitutionally enumerated powers." Id. Relying on Lue and Holland, the Eleventh Circuit agreed that such arguments are "misplaced," id., finding that "because 'Congress's authority under the Necessary and Proper Clause extends beyond those powers specifically enumerated in Article I, section 8[, it] may enact laws necessary to effectuate the treaty power, enumerated in Article II of the Constitution.'" Id., quoting Lue, 134 F.3d at 82 (brackets in original). The Eleventh Circuit therefore agreed with

the Second Circuit both that the statute was "well within the boundaries of the Constitution's treaty power⁵⁴ and that "Congress had authority under the Necessary and Proper Clause to enact the Hostage Taking Act." Id. at 1028. See also United States v. Bachner, 2011 WL 1743427, at *1-*2 (N.D. Ill. May 6, 2011) (rejecting a Tenth Amendment challenge to a statute prohibiting the possession of biological weapons, 18 U.S.C. § 175, which implemented the Biological Weapons Convention). In arguing that the Tenth Amendment invalidates Section 229, then, Bond is asking this Court to reject an unbroken line of cases, including Supreme Court cases, going back nearly a century. It also bears repeating that the proliferation concerns that the Chemical Weapons Convention seeks to address surely involve national interests as strong as or stronger than those at issue in this line of cases, and foreclosing the possibility of chemical weapons use "for all mankind," as the Convention sets out to do, clearly calls for coordinated, international action.

Finally, to the extent Bond has raised more general federalism concerns with Section 229, they are not only without legal foundation but also fundamentally misplaced.

In this case, neither the Convention nor its implementing legislation restrikes the balance between the federal government and the states. Section 229 neither preempts state law nor precludes state prosecution of the same activity.¹⁵ Rather, it establishes a parallel basis for

¹⁵ In Bond, Justice Kennedy noted, in characterizing Bond's argument, that "[t]he public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government. The law to which petitioner is subject, the prosecution she seeks to counter, and the punishment she must face might not have come about if the matter were left for the Commonwealth of Pennsylvania to decide." United States v. Bond, 131 S. Ct. at 2366 (discussing Bond's argument). However, no aspect of Pennsylvania law has been displaced by federal prosecution under Section 229. Section 229 does not preempt any Pennsylvania laws, nor does it impose any obligations upon Pennsylvania officials; and the fact that Pennsylvania authorities may have chosen not to bring a case does not preclude the federal government from doing so. It is well established that the federal government may, consistent with principles of dual sovereignty and double jeopardy, prosecute under federal law activity that might also be subject to state prosecution under state law. See, e.g., Heath v. Alabama, 474 U.S. 82, 88 (1985) ("The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the 'peace and dignity' of two sovereigns by breaking the laws of each, he has committed two distinct 'offences.'" (internal citations omitted)); United States v. Lara, 541 U.S. 193, 210 (2004) (holding that, following a tribal prosecution, the Double Jeopardy Clause does not prohibit the federal government from proceeding with a prosecution for a discrete federal offense). Bond's "federalism" arguments against Section 229 ignore the fact that such concurrent prosecutorial authority is a deeply entrenched feature of our constitutional order.

federal prosecution. Section 229 also does not require or compel state officials to take any particular action to address the behavior at issue here. State officials remain just as free to act, or not to act, as they were prior to Section 229's enactment. Accordingly, Section 229 advances compelling national and international interests, and does so in a manner that does not intrude on state prerogatives.

In short, the President's decision, by and with the advice and consent of the Senate, to have the United States become a party to the Chemical Weapons Convention was an appropriate exercise of the Treaty Power. The overall goal of that Convention -- eliminating the production and use of chemical weapons by both states and non-state actors -- is a national interest of the highest order. Congress fulfilled express obligations under the Convention by enacting implementing legislation, including 18 U.S.C. § 229(a)(1), that was both necessary and proper to implement the relevant provisions of the Convention. The district court correctly concluded that Congress acted within its constitutional authority.

CONCLUSION

For the reasons stated above, the government respectfully requests that this Court affirm the district court's decision denying Bond's motion to dismiss the first two counts of the indictment on Tenth Amendment grounds.

Respectfully submitted,

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CERTIFICATION

1. The undersigned certifies that this brief contains 9,896 words, exclusive of the table of contents, table of authorities, and certifications, and therefore complies with the limitation on length of a brief stated in Federal Rule of Appellate Procedure 32(a)(7)(B) and in this Court's order directing supplemental briefing.

2. I hereby certify that the electronic version of this brief sent by e-mail to the Court was automatically scanned by OfficeScan Real-Time Scan Monitor, version 10.5, by Trend Micro, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

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CERTIFICATE OF SERVICE

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